IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 142 OF 2018

COMMERCIAL BANK OF AFRICA (T) LTD .... PLAINTIFF

VERSUS

CHRISTOPHER PAUL CHALE .... 1ST DEFENDANT

FREDA UFOONEY CHALE (administratrix of the

Estate of the late Faustine Stanslaus Chale .... 2ND DEFENDANT

FREDA URASSA CHALE .... 3RD DEFENDANT

Date of Last Order:21/08/2020

Date of Judgement: 25/09/2020

JUDGEMENT.

MAGOIGA, J.

The Plaintiff, COMMERCIAL BANK OF AFRICA TANZANIA LIMITED by a plaint filed under summary procedure instituted the instant suit against the above named defendants jointly and severally praying for judgement and decree in the following orders, namely:

(a) Payment of the sum of USD.156,955.42 comprising of principal sum of USD.139,146.28 and interest of USD. 17,809.14 being the total outstanding amount on account of the credit facilities granted to the 1st defendant as at September, 25, 2018.

(b) Interest on the above at the contractual rate from September, 25, 2018 to the date of judgement.

(c) Interest on the decretal amount at the rate of 7% from the date of judgement to the date of full and final payment.

(d) Costs of the suit to be borne by the defendant.

In the alternative, failure to pay the amount at (a), (b),(c) and (d),

(e) Appointment of Mr. Gasper Nyika as receiver manager with powers to sale the mortgaged property on plot No. 439 Block 'G' Mbezi area in Kinondoni Municipality, Dar es Salaam with Title No. 115828

(f) An order for vacant possession of the mortgaged properties on plot No. 439, Block 'G' Mbezi area in Kinondoni Municipality, Dar es Salaam with Title No. 115828

(g) Any other reliefs which this honourable court may deem just to grant in favour of the plaintiff.

Upon being served with the plaint, the defendants successfully applied for leave to defend the suit. In their joint written statement of defence, the defendants admitted to some facts as to the credit facilities granted and disputed all other prayers by the plaintiff. Eventually, the defendants prayed that, the instant suit be dismissed with costs.

The facts pertaining to this suit are that, on 3rd September, 2010 the plaintiff granted the first defendant a credit facility of USD.60,000.00 for purpose of finishing up construction of a house on Plot No. 439 Mbezi area in Kinondoni with Title No.115828. The credit facility was charged an interest rate of 9% per annum to repaid in 72 equal installments of USD.1,081.53 and was secured by personal guarantee by Faustine Stanslaus Chale and Freda Urassa Chale supported by first ranking legal mortgage in favour of the plaintiff over the house on plot No. 439 Block 'G' Mbezi area in Kinondoni Municipality in Dar es Salaam with Certificate of Title No. 115828 in the names of Faustine Stanslaus Chale and Freda Urassa Chale to be registered at a full market value of TZS 383 millions to cover the credit facility and other related costs. On 16th June, 2011 the said credit facility was amended and a top up of USD 50,000.00 was advanced to the 1st applicant for the same purpose and conditions. Again on 17th December, 2013, the 1st defendant was granted an additional credit facility

of USD. 165, 966.46 which was to off-set the previous facilities and balance complete the project as aimed from the beginning.

The facts go that, the aforesaid additional credit facility letter interest rate was raised from 9% to 11% per annum and repayment was to be in 120 equal installments of USD.2,286.19 per month. Other terms remain the same as in the first credit letter.

Further facts were that, the 1st defendant failed to adhere to the terms and conditions of the agreement and as such, is in breach of the clear terms and conditions by failure to make good payment of installments as agreed, resulting to unpaid principal amount plus interest at the tune of USD. 156,955.42 as of 25th September, 2018. As a recovery measure, the plaintiff instituted this suit under summary procedure to be paid the outstanding loan and interest.

In their joint written statement of defence, the 1st defendant admitted to the amount of loan granted and claimed to have paid the loan in full. As to the 2nd and 3rd defendants, they agreed to guarantee the first loan of USD 60,000 but raised some issues against the plaintiff is respect of misrepresentation on the creation of the mortgage and personal guarantee agreement in favour of the plaintiff, denied giving consent to the variations

on the second and third loan agreements. The 1st defendant alleged that the credit facilities were set off against the USD. 234,235.10 deposited into his personal account, as such, called this court to dismiss this suit with costs.

At all material time, the plaintiff has been enjoying the legal services of Mr. Gaspar Nyika, learned advocate from legal clinic of IMMMA advocates. On the other part, the defendants have been enjoying the legal services of Mr. Edward Peter Chuwa, learned advocate from legal clinic of Chuwa and Co Advocates.

Before hearing started, the following issues were framed and agreed between parties for the determination of this suit, namely:

1. Whether the 1st defendant is in breach of the terms of the credit facilities Agreement dated 3rd September, 2010 as revised on 16th July, 2011 and 19th December, 2013 and to what tune?
2. Whether the 2nd and 3rd defendants guaranteed repayment of the credit facility granted by the plaintiff to the 1st defendant.
3. Whether the plaintiff was justified to debit USD. 233,256 credited in the 1st defendant's account.
4. What reliefs parties are entitled?

The plaintiff in proof of her case called two witnesses, one, SIBOGO MASUNGA MADUHU- who for purposes of these proceedings shall be referred to as PW1 and tendered exhibits 1- 7. Two, NELSON RICHARD MGONJA- who for purposes of these proceedings shall be referred to as PW2 and tendered exhibits 8-15.

PW1 under oath and through his witness statement adopted to be his testimony in chief told the court that, he is an employee and principal officer of the plaintiff working at the capacity of Recovery Officer. PW1 went on to tell the court that, he knows the 1st defendant who was issued with credit facility on 3rd September, 2010 and the 2nd and 3rd defendants who were guarantors of the 1st defendant to secure the obligations of the 1st defendant to the plaintiff. PW1 tendered the said credit facility letter dated 3rd September, 2010 in evidence which was admitted and marked as **exhibit P1.** According to PW1, the credit facility letter contained the following terms, among others, that:

(a) The loan was to bear interest at a fixed rate of 9% per annum on the outstanding loan balance of the facility at rate to be set by the plaintiff from time to time. The loan advanced was USD 60,000 and was construction of a

house at Plot No. 439 Block 'G' Mbezi area, in Kinondoni Municipality, Dar es Salaam with Certificate of Title No. 115828.

(b) The facility was repayable in 72 equal monthly installments of USD1,081.53 to be automatically debited from the account of 1st defendant.

(c) The facility was secured by personal guarantees by the 2nd and 3rd defendants, supported and created by first ranking legal mortgage over the house situated on plot No. 439, Block 'G' Mbezi area, Kinondoni Municipality in Dar es Salaam with C.T. 115828 in the name of the 2nd and 3rd defendants to be registered at a full market value of TZS 383 million to cover the credit facility and other related costs in favour of the plaintiff.

In proof of this, PW1 tendered a mortgage deed dated 21/09/2010 by the 2nd and 3rd defendants to the plaintiff which was admitted in evidence and marked as **exhibit P2.** Personal guarantees issued by the 2nd and 3rd defendants in favour of the plaintiff which were received in evidence and admitted collectively as **exhibit P3a-b.**

Further testimony of PW1 was that, in terms of clause 5 of the mortgage deed, the 2nd and 3rd defendants consented that; the mortgage deed shall continue to be security for further advances to the 1st defendant. And further, in clauses 4 and 16 it was agreed that, it shall be a continuing

security to the plaintiff and shall continue to be in force and effect as continuing security until discharged.

PW1 went on to tell the court that, on 16th July 2011 the terms of the credit facility letter were amended by the Addendum Credit Facility Letter in which the equity release facility was topped up by USD.50,000.00 for the same purpose and the first amount was amalgamated to make a total loan of USD. 104,598.12. And, that the interest rate on additional amount was changed to 11% per annum and repayment was to be in 120 equal monthly installments of USD.2,286.19. PW1 tendered in evidence Addendum Credit Facility Letter dated 27/07/2011 issued to the 1st defendant as **exhibit P4.**

Further testimony of PW1 was that, on 17th December, 2013, additional credit facility was created and issued to the 1st defendant. PW1 tendered in evidence additional credit facility letter as **exhibit P5.**

PW1 went to tell the court that, despite the fact that the 1st defendant was granted and enjoyed the facilities as stipulated above, he has failed to make monthly repayment installments as agreed and as a result the sum of USD.156,955.42 comprising of principal sum of USD.139,146.28 and USD.17,809.14 being the accrued interest remain outstanding on account of the credit facilities as of 25th September, 2018. And that same continue to

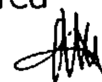
accrue at the rate of 11% per annum. In proof, PW1 tendered in evidence Bank Statement of the 1st defendant's account maintained by the plaintiff as **exhibit P6.**

Further testimony of PW1 was that, following the breach of the terms and conditions of the facilities, the plaintiff issued demand notices to the 1st defendant on 14th August, 2017, 30th August 2017 and 18th September, 2017 requiring the 1st defendant to remedy the default. The plaintiff further issued statutory notices of default to the 2nd and 3rd defendant on 10th October, 2017 with an advice to remedy the default, pointed out PW1. PW1 went on to testify that, despite all those efforts, the defendants have failed and /or neglected to repay the outstanding amount or any part thereof. In proof, PW1 tendered in evidence demand notices dated 14/08/2017, 30/08/2017 and 18/09/2017 together with two statutory notices of default dated 10/10/2017 collectively as **exhibit P7a-e.**

Under cross examination by Mr. Chuwa, PW1 told the court that, he has Masters in Finance and Advanced Diploma in Banking. PW1 said he was employed by the plaintiff in 2015. Prior to 2015, PW1 testified that he was working with Standard Chartered Bank. PW1 when pressed with questions PW1 told the court that, 1st defendant and the plaintiff have a bank-

customer relationship and the money in the account of the customer belongs to the customer. As to exhibit P1, PW1 said the loan was for six years expiring in 2015 and the securities issued had value in TZS 383 million. PW1 when shown exhibit P2 said the security was to cover up to TZS.383 million, and that, the 2nd and 3rd defendants were guarantors. PW1 when shown exhibit P3a-b stated that there was nowhere the amount of USD.60,000.00 was reflected but an amount of TZS.383 million. PW1 when shown exhibit P4 and asked to tell the exact amount of balance, he failed to state the precise amount. PW1 when pressed further, admitted that no deed of variation was done. PW1 when shown exhibit P5 said the amount of money due was USD.165,966.45 and it was to be paid in 10 years whose expiry would depend when the money was disbursed to the client. In exhibit P5, PW1 admitted no time to start was stated therein.

PW1 when pressed with questions admitted that according to **exhibit P6** on 27/07/2016 an amount of USD.116,028 was credited in the account of 1st defendant and another amount of USD.117,228/= was on 29/07/2016 credited as well, which brings a total of USD.233,256/=. However, PW1 pointed out that, this amount did not off-set the loan because payment was by installments and default started in 2017. Another reasons given by PW1 was that, when these two transactions were deposited a suspicion occurred



which made the money to be returned to the sender. PW1 told the court that, he is not in position to tell in details about the suspicions. Pressed with more questions, PW1 admitted that he has no voucher of transfer of the money back to the sender. More cross examined, PW1 equally admitted that, any debit must be authorized by the customer as a general rule save that there are exceptions where the bank can be instructed to freely debit the money without consent. PW1 was not able to tell who gave authority to transfer back the money to the sender.

PW1 went on to tell the court that, when this suit was instituted the loan period had not expired. PW1 told the court in the absence of lawful order, it will depend on the purpose of the money credited.

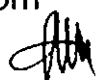
Under re-examination by Mr. Nyika, PW1 when shown exhibit P1 said that clause 16 is about events of default and its consequences of paying the whole amount plus interest. PW1 when shown exhibit P3 said clause 3 was clear that in securing all banking securities granted to Christopher Paul Chale's obligations to the bank. PW1 when shown exhibits 4 and 5 said that new loan was amalgamated to USD.104,598.12 and other conditions in the former facilities remained intact including the default clause. When asked of the USD.233,256./= credited in the personal account of 1st

defendant, PW1 replied that, there were no instructions to liquidate the loan and that by the time he defaulted; the amount was not in the account because the money was returned to the sender following police investigations.

PW1 when asked to clarify who instructed the money to be returned he said he doesn't know but he is sure the money was returned. This marked the end of testimony of PW1.

The next witness for the plaintiff was Mr. NELSON RICHARD MGONJA- to be hereinafter referred as PW2. PW2 under oath and through his witness statement adopted to be his testimony in chief told the court that, he is an employee of the plaintiff at the capacity of Acting Head of Operations from 2016 to 2018. According to PW2, his duties were managing operational risks like authorizing incoming and outgoing payments; advising the bank on operational risks and scrutinizing and authorizing amounts deposited above the limits.

PW2 further testimony was that he knows 1st defendant who at all material times had been a customer of the plaintiff with Nufaika account No. 102373100028. PW2 said he was equally aware of the two deposits of USD. 233,256.00 done on 27th July and 29th July 2016 into that account from

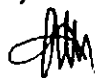


HSBC Bank China on behalf of the Treasury Big International Limited in favour of the 1st defendant. PW2 tendered in evidence **exhibit P10 and P11** in proof of the payments.

However, PW2 pointed out that, the two transactions were captured as suspicious transactions under the Anti-Money Laundering Act and Regulations due to irregular nature for being beyond the normal transactions conducted in the 1st defendant's account. PW2 tendered in evidence bank statement of Christopher Paul Chale(1st defendant) with No. 102373100028 starting from 02/12/2013 up to 31/07/2017 as **exhibit P8.**

PW2 went on to tell the court that, due to such suspicion, the plaintiff requested the 1st defendant to provide proof of the source of funds and purposes of the transactions and equally reported the matter to the Financial Intelligence Unit as suspicious transaction in accordance with Anti-Money Laundering Laws. PW2 pointed out that, the 1st defendant via a letter dated 2nd August 2016 wrote the plaintiff but which letter was wanting in proof of the purpose and source funds. PW2 tendered the letter with its annexures dated 2nd August 2016 in evidence as **exhibit P9.**

Further testimony of PW2 was that, on 15th August 2016, the plaintiff was issued with a directive from Director of Criminal Investigations (DCI)

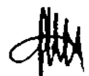


requiring it to freeze the 1st defendant's account for purposes of investigations. PW2 tendered a written directive from the DCI in evidence as **exhibit P15.**

PW2 went on to tell the court that, while the account was being investigated, the plaintiff received instructions from the remitting bank requiring the plaintiff to return the amount deposited. The plaintiff as such wrote to the DCI on 19/10/2016 informing them of the request and requested for the 1st defendant's account to be unfrozen to enable the call back to be carried by the plaintiff. PW2 tendered in evidence swift cancellation MT199 of the amount of USD.116,028 and USD.117,228/=remitted to the account of 1st defendant as **exhibit P12 and P13** respectively.

PW2 further testimony were that communications went on between the DCI and the plaintiff which eventually DCI lifted the freezing order and enabled the plaintiff to remit the funds back. In proof, PW2 tendered in evidence two letters dated 15/06/2017 and 13/07/2016 as **exhibit P14a-b.**

PW2 told the court that, the funds were remitted following the 1st defendant's failure to satisfy to the plaintiff on the source of such funds in accordance with the requirement of Anti Money Laundering Laws and as



such concluded that, the plaintiff was justified to debit the deposited amount of USD.233,256.00 which was credited into the account of 1st defendant's bank account.

Under cross examination by Mr. Chuwa, PW2 told the court that, he was employed by the plaintiff in 2016, and that, before that he was working with BOA Bank, hence, when the transaction started while he was not in the plaintiff's bank. PW2 told the court that, he has Masters in Banking and Finance. According to PW2, the 1st defendant had one account with Nos. 102373100028, in which all transactions were done. PW2 went on to tell the court that, the suspicion was reported to Financial Intelligent Unit in writing via a special report. Pressed with questions, PW2 told the court that DCI or IGP can freeze an account for 7 days only but by the time the letter by M& A Attorneys was written 7 days had elapsed. PW2 pressed with question admitted to know that after 7 days the account can continue to be frozen by court's order and nothing else. PW2 told the court that he has never seen court order for this transaction and that the 1st defendant was denied access to account based on letter and not court order. However, PW2 pointed out that 1st defendant utterly failed to provide tangible evidence of the money to support the transactions. PW2 told the court there are situations where a bank can reveal clients affairs to third parties.

In this case, the bank was working under the directions of the DCI. Eventually after long communication the money was remitted back to China. PW2 insisted that 1st defendant is indebted to the bank and prayed that this suit be allowed as prayed in the plaint.

Under re-examination, PW2 told the court that, the money was debited but no proof that it was remitted back to China. PW2 went on to say freezing order was not cancelled. PW2 said the money laundry issue was complicated.

This marked the end of the plaintiff's case and same was marked closed.

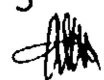
The defendants called two witnesses (to be referred herein as DW1 and DW2) and tendered 4 exhibits (two exhibits through PW2, **exhibit D1** which was a letter dated 19/10/2016 from Commercial Bank of Africa to DCI and **exhibit D2** which was letter dated 21/07/2017 from DCI to the bank) and prayed exhibits P5 which is additional credit facility letter dated 17/12/2013 and P8 a bank statement from the plaintiff's bank in the name of DW1 to form part of their defence.

DW1 under oath and through his witness statement which was adopted to be his testimony in chief told the court that, he is the 1st defendant in this suit and disputes to breach any term of the facility agreements dated 3rd

December, 2010, 26th July, 2011, and 17th December, 2013. According to DW1, he paid the entire outstanding amount over the loan agreements and as such the plaintiff is not entitled to any claim against him. Instead DW1 told the court that, it is him who claims USD.233,257 and damages vide Civil Case No.157 of 2017 pending in Dar es Salaam registry in which no counter claim has been raised.

DW1 admitted to be plaintiff's customer operating a bank account with credit and loan account. DW1, further admitted to be granted loan facilities of USD.60,000.00 on 3rd December, 2010 and a top up facility of USD.50,000.00 dated 26th September, 2011 for period of 6 years each, which were to expire on 25th July, 2017, which were all secured by 2nd and 3rd defendants' property with Certificate of Title No. 115828 with market value of TZS.383,000,000/=.

DW1 went on to tell the court that, despite the clear wording of the security clause, the plaintiff prepared a legal mortgage over the certificate of title No. 115828 and misrepresented to 2nd and 3rd defendants that, they were securing a credit facility of up to TZS.383,000,000/=. Further testimony of DW1 was that on 21st September,2010, the plaintiff, few days after the offer prepared and executed two guarantee agreements for the 2nd and 3rd



defendants and misrepresented that, DW1 was indebted to the plaintiff the sum of TZS.383,000,000/= while it is not true. DW1 insisted that, the said guarantee agreements never referred to a loan of USD.60,000.00 as contained in the offer letter dated 03rd September, 2010.

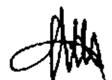
DW1 further testimony was that, on 17th December, 2013 was offered another facility of USD.165,996.46 by the plaintiff with the same purpose. According to DW1, this loan liquidated the previous loans and they ceased to exist and the tenure of the loan was changed from 6 years to 10 years to expire on 16th December,2023, which is yet to expire. Further, according to DW1, the 2nd and 3rd defendants never executed any guarantee to secure the new facility and were not aware of the new arrangement and there was no way a Deed of Variation which was executed over certificate of title No. 115828 without involving them is lawful and binding on them.

DW1 testified that, while paying the loan from various sources, on 27th July, 2016 and 29th July, 2016, and while the loan tenure had not yet expired and before any notice of default was served on him, his business partner in the name of **Treasure Big International Limited** transferred into his account No. 0108216 as Nufaika account maintained by the plaintiff for USD.233,256. This money, according to DW1, became his money subject to

withdrawal in normal banking practice which included prior authorization, including deducting loan repayments. DW1 went to tell the court that, on 5th August 2016, DW1 went to the bank to withdraw USD.1300.00 but was arrested by police officers on malicious report by the plaintiff and taken up to Financial Crime Unit and Central police where he was later released on bail.

DW1 testified that, upon release he went back to the plaintiff bank to make withdraw but was told by Patrick Malewo, the company secretary of the plaintiff that, his account has been frozen but that they will recoup the money from the account as it has enough money to meet loan obligations. DW1 told the court that, on 30th August 2016 the plaintiff deducted USD.2308.68 being principal repayment and interest repayment.

DW1 went to tell the court that, on 21st September, 2016 the plaintiff requested for authorization to debit his account with the money back to the sender but DW1 declined to allow such request. Upon refusal, DW1 toid the court that, the plaintiff went on to debit his account for purposes of repayment of principal and interest and between 30th September, 2016 and 30th June 2017 an amount of USD.24,308.90 was repaid as earlier intimated that they will deduct repayments installments from the account.



DW1 told the court that, on 21st September, 2016 the plaintiff informed DW1 that the sender of the money had called back the money, and that, they need his authorization to debit the money back but he declined. Further, DW1 testified that, on 13th January 2017 the plaintiff officer one Patrick Malewo informed DW1 that, his account will continue to be frozen as there was ongoing criminal investigation over the money. DW1 went on with his testimony that, on 21st July, 2017, DCI directed the plaintiff to unfrozen the account of DW1 as no further investigation was going on, but on 28th September, 2017 without his authority or legal justification, the plaintiff debited USD. 233,256/= from his account.

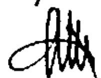
DW1 testified that, he has never been prosecuted nor convicted on any allegation or any criminal allegation to warrant his money remitted back to the sender and as such DW1 has never breached any term of the loan agreement. As to the demand notice, DW1 said it was uncalled, unjustified and breach of the agreement for his account had enough money to meet the obligations as per the agreement. Eventually, DW1 prayed that, this suit be dismissed with costs.

Under cross examination by Mr. Nyika, DW1 told the court that, he does not dispute the loans granted of USD.60.000.00, USD.50,000.00 and

USD.165,966.00. And that, the latter loan was to off-set the former two loans. According to DW1, he had enough money into his account to pay the loan in full. DW1 when pressed with questions told the court that, if the court finds that, the reverse was lawful, then, he admitted to be indebted to the bank. DW1 told the court that, there is no dispute that, he was served with statutory notice of default. And, admitted that, he never gave special instruction on repayment of the loan and any reverse was done without his authority. DW1 equally admitted to be arrested relating to the money by police officer and FIU on 05/08/2016.

Under re-examination by Mr. Chuwa, DW1 told the court that, he has never instructed the bank to use the money for any purpose. DW1 insisted after release from police no further action was taken.

The next witness for the defence was FREDA URASSA CHALE- referred as DW2. Under oath and through her witness statement which was adopted as her testimony in chief told the court that, her other names are FREDA OFOONENY CHALE. DW2 went on to tell the court that, she is the 3rd defendant and administratix of estate of her late husband, one, Faustine Stanslaus Chale, the second defendant. DW2 went on to tell the court that, herself and her late husband are registered owners of landed property

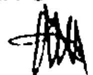


described as Plot No. 439 Block 'G' Mbezi area, comprised of Certificate of Title No. 115828. DW2 admitted that in September, 2010 the first defendant (who is their biological son) informed them that he had borrowed USD.60,000.00 from the plaintiff and has pledged their certificate of title as security for the loan, which information they agreed with. According to DW2, they were surprised to be served with notice of default and later on served with the plaint in which they were sued jointly. DW2 told the court that, upon being served with the plaint they noted the following:

That there was misrepresentation by the plaintiff in executing the legal mortgage that were securing a loan of TZS.383,000,000/= while the credit facility date 3rd September was only for USD.60,000.

That they were made to sign a guarantee agreement on the same day showing that the 1st defendant had borrowed TZS.383,000,000/= while it was not true and in the contents of the guarantee agreements, there was no any reference to the credit facility of USD.60,000.00 which they had in mind.

That they were not aware of the addendum between the plaintiff and 1st defendant dated 26th July, 2011 for USD.50,000.00 and that they have



never pledged their property to secure that loan after the first one of USD.60,000.00

That additional loan of USD.165,966.46 which was to liquidate the first loan they were never consulted on its arrangement nor did they sign any document relating to it. However, according to DW2, since it liquidated the first loans, their liability was equally discharged.

That in the mortgage deeds created at pages 2 and 3 reference is made to offer letter dated 3rd September, 2010 for USD.60,000.00 and that they have never executed any deed of variation to amend the mortgage for purposes of securing the loan of USD.165,966.46. On the above reasons, DW2 prayed that this suit be dismissed with costs.

This marked the end of hearing of the defence case.

The learned advocates for parties prayed to this court to file final written closing submissions and prayed that they be allowed to file same within 14 days from the date of close of the defence case. Their prayer was granted. The learned advocates for parties complied with the order of this court. I have had an opportunity to read their respective closing written submissions in their respective stances. I truly commend them. I will, in the course of

determining this suit, refer to them here and there but where I will not, it suffices to say are noted and accorded the weighty they deserve.

Upon summarizing the evidence of the parties read together with exhibits tendered, the remaining task of this court now is to determine the merits or demerits of this suit. However, before going into the determination of the issues framed, this court has noted some of the facts not in dispute between parties, which in one way or another will assist in the determination of the instant suit. These are. **One,** there is no dispute that, the 1st defendant was granted and enjoyed the credit facilities of USD.60,000.00 vide credit facility letter dated 3rd September, 2010,(**exhibit P1)** which credit facility was secured by personal guarantee by 2nd 3rd defendants supported by 1st ranking legal mortgage in favour of the plaintiff over a house standing on plot No. 439 Block 'G' Mbezi area in Kinondoni Municipality in Dar es Salaam with CT.115828. **Two,** there is no dispute that, on 16th June 2011, the credit facility letter was amended by the addendum credit facility letter **(exhibit P4)** and a top up of USD.50,000.00 was granted to the 1st defendant amalgamating the whole loan to USD.104,598.12. **Three,** there is equally no dispute that, on 17th December, 2013 the 1st defendant was granted additional loan of USD, 165,966.46 to liquidate the 1st defendant's then existing loan exposure and

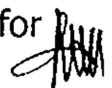
under the Addendum Credit Facility letter and a balance was to finance the project as earlier purposed. The rest of the matters are in dispute.

I have dispassionately considered the entire evidence on record and the written closing arguments of the trained legal minds and have considered the nature of allegations of the plaintiff and the defence put forward by the parties, I find it imperative to start with issue number three which is to the effect that, whether the plaintiff was justified to debit USD.233,256.00 credited in the 1st defendant's account. The determination of this issue has serious bearing to issue number one.

Therefore, having carefully considered the entire evidence on this issue, I am constrained to answer it in the affirmative. I will explain. **One,** the contents of exhibits P15, P14b, P12 and P13 altogether shows that the bank was under justifiable instructions to return funds to the sender. **Two,** not only plaintiff's exhibits but the contents of exhibit D3 as well confirmed that, the return of the funds was justifiable. **Three,** exhibit P9 which was an explanation of 1st defendant on the purpose of the funds shows it was for purchase of two Scania trucks but which explanation was wanting as correctly testified by PW2 for want of any justification of the mentioned business. **Four,** Much as I agree with Mr. Chuwa and the holding in the

case of MALAYAN BANKING BERHAD v. BARCLAYS BANK PLC [2019] SGHC (1) 04 that as a general rule that once payment has been done is irrevocable unless a consent of the recipient is sought. However, I wish to point out that, with due respect to Mr. Chuwa, learned advocate for the defendants, there is no general rule without exception and as such I don't agree with him that once the money is credited, then the bank cannot debit it to the calling bank. Each case has to be decided on its own peculiar facts. In the instant suit, there were serious suspicious circumstances that no explanation was offered from the recipient. Not only that, but **exhibit P12** shows the cancellation was originating from TREASURE BIG INETRNATIONAL LIMITED and HSBC bank. Therefore, with all these exceptions, I am constrained to find and hold that the case of Malayan is distinguishable from the facts of our case here. In the totality of the above reasons, I proceed to answer issue number three in the affirmative.

Having answered issue number three in the affirmative, I now go back to issue number one, which was couched that; whether the 1st defendant is in breach of the terms of credit facility agreements dated 3rd September, 2010, as revised on 26th July 2011 and 19th December, 2013 and to what tune? Much as the arguments of the 1st defendant for payment of the loan in full was pegged on the amount of USD.233 256 deposited into his account for



reliance of the payment of the loans as stipulated, and much as this court having held herein above that, the money was justifiably debited, I find this issue will not detain this court. It should be noted that, no dispute that the money was advanced and enjoyed by the 1st defendant as stipulated in **exhibits P1, P4, P5 and exhibit P6**. According to exhibit P6, the last transaction done in respect of payment of the principal amount due and interest is 30th October 2017 and the balance due is USD.143,450.41. The plaintiff claimed USD.156,955.42 as of September, 2018 being principal and interest. However, according to evidence tendered in this court, the amount of USD. 143,450.41 remained unpaid. It is, therefore, the considered opinion of this court that, this is a breach of the terms of facilities letters as agreed between 1st defendant and the amount proved is USD.143,450.41.

The arguments by Mr. Chuwa that, since the amount of USD.233,256 credited in the account of the 1st defendant suffices to discharge the loan are far from convincing this court otherwise given the reasons given in the determination of issue number three above.

This trickles down to issue number two which is to the effect that, whether the 2nd and 3rd defendants guaranteed repayment of credit facility granted to the 1st defendant. The thrust of the defendants' testimonies and written

arguments by their learned advocate on this issue are three folds; **one,** that they admit to have guaranteed credit facility letter dated 3rd September, 2010 which was consequently discharged upon grant of the credit facility letter dated 19th December, 2013 whose purpose was, among others, to liquidate the existing loan exposure in full. And, **two,** is that they never signed anywhere to signify any subsequent guarantee of the grant of additional credit facility. **Three,** the loan has been discharged by the money that came from China.

Having considered the evidence of both sides and having read the contents of **exhibits P1, P4 and P5** carefully, I find with profound respect to the defendants and Mr. Chuwa that, their arguments are not true and are misleading and deliberate to the situation at hand. I will demonstrate herein below. Once, exhibit P1 is not disputed, then when one reads exhibit P4 which is Addendum Credit Facility to it says voluminous on collateral:-

"Collateral- this credit facility will be secured by the following:-

> **Personal Guarantee supported by the first ranking Legal Mortgage in favour of the Commercial Bank of Africa (Tanzania) Limited over the house on plot No. 439 Block "G" C.T.No. 115828 Mbezi area, Kinondoni Municipality in Dar es**

Salaam city in the names of Faustine Stanslaus Challe and Freda Urassa Challe to be registered for TZS 504, 000,000.00 to cover the credit facility to a minimum of 125%."

From the foregoing, then, it is evidentially clear that, the guarantee that was given to **exhibit P1** has direct bearing to **exhibit P5-** which additional credit facility and to additional facility letter dated 27th December, 2013.

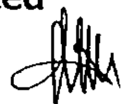
Nevertheless, looking at exhibit P5 which the defendants say is new and they never gave their consent, the same had the following:-

> **"We refer to your credit facility application dated 08th October,2013 and our credit facility letter dated 03rd September,2010 and Addendum of 26th July, 2011 and are pleased to advise that, we have agreed to accord you with an additional facility as per terms and conditions outlined herein."**

The said facility letter stated on collateral it says the following:

Terms and Conditions:

"Irrespective of any review of the facility, other terms and conditions under our credit facility letter dated 3rd dated



September, 2010, and Addendum of 26th July 2011 shall continue to apply unless amended by a letter of amendment and <u>any security provided by or for the borrower shall continue to have full force and effect throughout the life of the facility enumerated herein provided that the facility or any part thereof is being utilized and/or outstanding."</u> (Emphasis mine).

Therefore, it is obvious from the foregoing that the credit facility letter dated **17th December 2013 (exhibit P5)** stems from the credit facility which they admitted to have guaranteed.

The defendants arguments that, the bank committed misrepresentation lacks legal and factual legs to stand and is hereby rejected. Given the relationship between defendants it cannot be heard to say the 2nd and 3rd defendants did not know all these arrangement. To accept their argument will amount one to eat a cake and still have it!

In the circumstances, I hereby find and hold that the 2nd and 3rd defendants guaranteed the loan facilities as proved by the plaintiff.

This takes this court to the usual issue that, what reliefs parties are entitled to. This issue will not detain this court much given the above holding in issues numbers 1, 2 and 3. The plaintiff without much is entitled to the

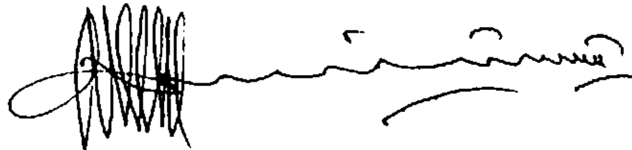
prayers as contained in the plaint save that prayer (a) is only granted to the extent of USD. 143,450.41. The rests are granted as prayed.

That said and done, the defendants are given six months to pay all outstanding principal as adjudged with interest as prayed. In case of failure to pay all money due within that period, the alternative prayers are hereby granted as prayed in the plaint.

In the end, this suit is allowed with costs.

It is so ordered.

Dated at Dar es Salaam this 25th day of September, 2020



S. M. MAGOIGA

JUDGE

25/09/2020